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No. 07-___

IN THE
Supreme Court of the United States

TERRANCE L. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Ronald C. Small
Michael C. Holley
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
810 Broadway Street
Suite 200
Nashville, TN 37203

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

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QUESTION PRESENTED

When a defendant violates the terms of his supervised release, may the district court base the new sentence upon the factors enumerated in 18 U.S.C. § 3553(a)(2)(A)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Terrance L. Lewis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a) is published at 498 F.3d 393.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2007. Pet. App. 1a. A timely petition for rehearing was denied on December 21, 2007. Pet. App. 17a. On March 14, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 18, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix to this brief reproduces the relevant portions of 18 U.S.C. § 3553 (Pet. App. 34a) and 18 U.S.C. § 3583 (Pet. App. 37a).

STATEMENT

Upon pleading guilty to a drug distribution charge, petitioner was sentenced to a term of imprisonment followed by five years of supervised release. After petitioner served his prison term and completed four and a half years of supervised release, the district court revoked his supervised release, finding that he had violated several of its terms.

In imposing a new sentence for the violation, the district court explained that it calibrated the sentence in part "to reflect the seriousness of the offense," to "promote respect for the law," and to "provide just punishment." Pet. App. 11a. These so-called "just punishment" factors are listed among the considerations the federal sentencing statute requires a court to consider when imposing an initial sentence for a crime. 18 U.S.C. § 3553(a). A separate statutory provision, 18 U.S.C. § 3583(e), governs the revocation of supervised release. The revocation provision incorporates by reference most of the factors listed in the original sentencing provision, but omits the "just punishment" factors relied upon by the district court in this case. On appeal, the Sixth Circuit acknowledged that two courts of appeals have held that because Congress excluded the just punishment factors from the revocation provision, a district court may not rely on such considerations in a revocation proceeding. The Sixth Circuit, however, joined the Second Circuit in rejecting that view and, accordingly, upheld petitioner's sentence.

1. Sentences for original convictions are governed by 18 U.S.C. § 3553, which instructs that "[t]he court, in determining the particular sentence to be imposed, shall consider" a list of enumerated factors. 18

U.S.C. § 3553(a).[1] Among these sentencing considerations are the "just punishment" factors of subsection (a)(2)(A), which provides that the district court "shall consider . . . the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).

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[1] The ten factors enumerated in 18 U.S.C. § 3553(a) are:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for (A) the applicable category of offense . . . as set forth in the guidelines . . . [or] (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements . . . ;

(5) any pertinent policy statement . . . issued by the Sentencing Commission . . . in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Congress enacted a separate statutory provision to govern revocation of supervised release.[2] 18 U.S.C. § 3583(e). Because "the primary goal [of supervised release] is to ease the defendant's transition into the community . . . or to provide rehabilitation," S. Rep. No. 98-225, at 124 (1983), Congress separately enumerated the considerations to be taken into account in modifying or revoking supervised release. In particular, Congress provided that a court may modify or revoke supervised release only after "considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)." 18 U.S.C. § 3583(e). Thus, the court must consider most of the factors governing the imposition of an original sentence upon conviction of a crime, with the conspicuous exclusion of the factors listed in section 3553(a)(2)(A) (the just punishment factors) and section 3553(a)(3) (which requires the original sentencing court to consider "the kinds of sentences available").

2. In 1995, petitioner Terrance L. Lewis pled guilty to one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Pet. App. 2a. The district court sentenced him to 137 months' imprisonment, to be followed by five years of supervised release. *Id.* In 1999, the court ordered petitioner's sentence reduced to 92 months. *Id.* Petitioner completed his prison term and began

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[2] That provision states that if a court finds that a defendant has violated a condition of supervised release, it may "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release" subject to certain qualifications not relevant here. 18 U.S.C. § 3583(e)(3).

serving his supervised release on October 26, 2001. *Id.*

On February 16, 2006, the Probation Office filed a petition with the district court seeking to revoke petitioner's supervised release. Pet. App. 2a. After a hearing, the district court found that petitioner violated the terms of his supervised released by failing to report contact with the police after he was briefly detained for minor traffic violations on three occasions; failing to file required monthly reports or to report that he had purchased a motorcycle; and refusing to provide the address of his daughters' house, which would have enabled probation officers to conduct home contacts at his daughters' home. *Id.* at 2a-3a, 18a-21a.

In response, the district court revoked petitioner's supervised release and sentenced him to six months' home detention followed by an additional 24 months of supervised release. Pet. App. 3a. In its written judgment, the court explained that:

> The reasons for the sentence imposed are as follows: *to reflect the seriousness of the offense; to promote respect for the law; to provide just punishment*; to provide an adequate deterrence to this Defendant and others from criminal conduct; and to protect the public from future crimes of this Defendant and of others who may participate in similar offenses.

Id. at 11a (emphasis added). The first three of these factors are taken verbatim from section 3553(a)(2)(A)—the "just punishment" factors that are specifically *omitted* from the list of factors to be considered for a revocation sentence under section 3583(e).

4. Petitioner appealed his sentence to the Sixth Circuit, arguing that his revocation sentence was based in part on impermissible factors.[3] Reviewing decisions from several other circuits, the Sixth Circuit found that the courts of appeals are deeply split over whether a district court may consider the just punishment factors in a revocation proceeding. It first noted that the Second Circuit has interpreted section 3583(e) simply to require the district court to consider the factors incorporated by reference from section 3553, without forbidding consideration of additional factors Congress did not incorporate. Pet. App. 12a (citing *United States v. Williams*, 443 F.3d 35, 47 (2d Cir. 2006)). "By contrast," the Sixth Circuit recognized, the Fourth Circuit has held that "'in devising a revocation sentence[,] the district court is not authorized to consider' § 3553(a)(2)(A)." *Id.* (quoting *United States v. Crudup*, 461 F.3d 433, 439 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 1813 (2007)). "Likewise, the Ninth Circuit held that 'a sentence would be unreasonable if the court based it primarily on an omitted factor, such as a factor provided for in § 3553(a)(2)(A).'" *Id.* (quoting *United States v. Miqbel*, 444 F.3d 1173, 1182 (9th Cir. 2006)).

Faced with these conflicting rules, the court of appeals adopted the minority view of the Second Circuit, Pet. App. 13a, holding "the fact that a sentencing court . . . consider[s] § 3553(a)(2)(A) is not error," *id.* at 15a. Finding no other error in the district court's decision, and concluding that the

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[3] Petitioner also challenged the district court's finding that he had in fact violated the supervised release. The court of appeals rejected that argument, Pet. App. 3a-8a, and petitioner does not renew it here.

sentence was "neither unreasonable nor plainly unreasonable," *id.*, the court affirmed.[4]

5. Petitioner filed a timely petition for rehearing and rehearing en banc, noting that the panel decision exacerbated a circuit split with the Fourth and Ninth Circuits. *See* Pet. Reh. 10-12. The Sixth Circuit nonetheless denied further review. Pet. App. 17a-18a. This petition followed.

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[4] For that reason, the court found it unnecessary to decide whether a revocation sentence is to be reviewed to determine whether it is "plainly unreasonable," as was the law of the circuit before this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), or whether a revocation sentence should be judged under the "unreasonableness" standard established in *Booker* for the review of an original sentence. Pet. App. 8a-9a. That question is the subject of an unresolved circuit split. *See, e.g., United States v. Jones*, 484 F.3d 783, 791-92 & nn.30-31 (5th Cir. 2007) (collecting cases).

REASONS FOR GRANTING THE WRIT

As the Sixth Circuit's decision frankly acknowledges, whether a district court may consider the "just punishment" factors of 18 U.S.C. § 3553(a)(2)(A) when imposing a revocation sentence has vexed the lower courts and led to an ever expanding division among the circuits. In the past two years alone, four circuits have directly confronted the question, evenly dividing on an important and frequently recurring question that only this Court can conclusively resolve. This case presents the Court an ideal opportunity to eliminate the division in the lower courts and to restore the uniformity in sentencing Congress intended.

I. The Courts Of Appeals Are Intractably Divided Over What Factors A Court May Consider In Sentencing A Defendant For Violation Of The Terms Of Supervised Release.

1. In holding that it is permissible for a court to consider the factors in section 3553(a)(2)(A) when revoking a term of supervised release, the Sixth Circuit rightly acknowledged that it was deepening a circuit conflict.

a. In *United States v. Miqbel*, 444 F.3d 1173 (9th Cir. 2006), as in this case, the district court revoked the defendant's supervised release in part "to promote respect for the law and to provide just punishment for the offense." *Id.* at 1175. The district court acknowledged that it was unclear whether such a consideration was permissible and suggested that the parties seek clarification from the Ninth Circuit on appeal. *Id.* at 1181 n.17. The court of appeals obliged, holding that a district court's consideration of

the "just punishment" factors listed in section 3553(a)(2)(A) is improper. *Id.* at 1182-83.

The court began by noting that "[s]ection 3583(e) incorporates the majority of the factors listed in § 3553(a) as factors to be considered in sentencing upon revocation of . . . supervised release." *Id.* at 1181. "Section 3583(e) specifically omits, however, § 3553(a)(2)(A), which provides for consideration of the 'need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.'" *Id.* at 1181-82. Whereas the Sixth Circuit decided in this case that the omission did not preclude a district court from considering the excluded factors, the Ninth Circuit reached the opposite conclusion. The court held that because "Congress deliberately omitted [section 3553(a)(2)(A)] from the list applicable to revocation sentencing, relying on that factor when imposing a revocation sentence would be improper." *Id.* at 1182; *see also, e.g.*, *United States v. Simtob*, 485 F.3d 1058 (9th Cir. 2007) (reaffirming holding);[5]

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[5] In *Simtob*, the Ninth Circuit clarified that the revocation court may consider one of the just punishment factors – the "seriousness of the offense underlying the revocation," *id.* at 1062 – in the course of evaluating the criminal history of the defendant, a proper revocation factor under 18 U.S.C. § 3583(e). *See* 485 F.3d at 1062-63. The court did not suggest, however, that consideration of any of the other "just punishment" factors would be appropriate and held that even with respect to the seriousness of the defendant's offense, a "district court may not impose a revocation sentence *solely*, or even primarily, based on the severity of the new criminal offense underlying the revocation." *Id.* at 1063. The court of appeals in this case, by contrast, held that a district court may consider and rely upon all of the just punishment factors without limitation. *See* Pet. App. 14a-15a.

United States v. Barnes, No. 07-50198, 2007 WL 4227258 (9th Cir. Dec. 3, 2007) (vacating revocation sentence because district court relied on just punishment factors).

As the Sixth Circuit acknowledged, the Ninth Circuit is not alone in this view. In *United States v. Crudup*, 461 F.3d 433 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 1813 (2007), the Fourth Circuit agreed with the Ninth that "as mandated by § 3583(e), not all the original sentencing factors of § 3553(a) can be considered when reviewing a revocation sentence." *Id.* at 439. Although the court of appeals ultimately concluded that the district court in that case had not actually relied on an inappropriate factor in revoking the defendant's supervised release, the court made clear that a "district court is not authorized to consider whether the revocation sentence 'reflect[s] the seriousness of the offense, ... promote[s] respect for the law, and ... provide[s] just punishment for the offense ...." *Id.* (citing 18 U.S.C. § 3553(a)(2)(A)). The Fourth Circuit has reaffirmed this understanding in subsequent cases as well. *See United States v. Moulden*, 478 F.3d 652, 656 (4th Cir. 2007) (noting that a court revoking supervised release may consider "just some of" the factors listed in 18 U.S.C. § 3553(a)); *United States v. Turner*, 241 F. App'x 168, 170 (4th Cir. 2007) (reaffirming that "[a]ccording to § 3583(e), in devising a revocation sentence, the district court is not authorized to consider whether the revocation sentence" serves the ends of the "just punishment" factors (citing *Crudup*)).

In this case, the Sixth Circuit recognized but explicitly rejected the holdings of the Fourth and Ninth Circuits. Pet. App. 13a. Instead, it "adopt[ed] the Second Circuit's position," *id.* at 13a-14a, as set

forth in *United States v. Williams*, 443 F.3d 35 (2d Cir. 2006). In *Williams*, the Second Circuit reasoned that section 3583(e) "does not state that any particular factor cannot be considered." *Id.* at 47. Instead, in the view of that court, section 3583(e) merely "requir[es] consideration of the enumerated subsections of § 3553(a) without forbidding consideration of other pertinent factors," including the unmentioned factors from section 3553(a). *Id.*

b. The conflict and confusion extends beyond that identified in the Sixth Circuit's decision in this case.

For example, the Seventh Circuit, in *United States v. Dillard*, 910 F.2d 461 (7th Cir. 1990), seemingly approved reliance on the just punishment factors in formulating a revocation sentence, although it is unclear whether the propriety of those factors was challenged in that case. The defendant in *Dillard* asserted that the "district court failed to identify the factors on which it based its decision to impose a sentence of incarceration." *Id.* at 465. The court of appeals responded by quoting at length from the district court's explanation for its sentence and concluding that the stated "reasons fall squarely within those cited in 18 U.S.C. § 3553(a)(2)," including "the need for the sentence imposed to 'reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.'" 910 F.2d at 465 (quoting 18 U.S.C. § 3553(a)(2)(A)). The court repeated the same list of factors in *United States v. McClanahan*, 136 F.3d 1146, 1151-52 (7th Cir. 1998), and has approved reliance on just punishment considerations in a number of unpublished decisions. *See, e.g., United States v. Franklin*, 239 F. App'x 287, 289 (7th Cir. 2007) ("the nature and seriousness of [the] offense");

United States v. Simmon, 125 F. App'x 744, 746 (7th Cir. 2005) ("the need to reflect the seriousness of the offense [and] promote respect for the law"); *United States v. Stewart*, 107 F. App'x 667, 670-71 (7th Cir. 2004) (seriousness of offense); *United States v. Smith*, 93 F. App'x 956, 959 (7th Cir. 2004) ("the need to 'promote respect for the law.'").

The Eighth Circuit has similarly stated, without analysis, that consideration of just punishment factors is appropriate in revocation cases. *See United States v. White Face*, 383 F.3d 733, 737-38, 740 (8th Cir. 2004) (noting that among the factors a district court "should consider" upon revocation of supervised release is "the need for the sentence to provide just punishment for the offense"); *United States v. Jasper*, 338 F.3d 865, 867 (8th Cir. 2003) (holding that when sentencing a defendant for a violation of supervised release, "the court must consider [the sentencing purpose of] promoting 'respect for the law'"); *United States v. Touche*, 323 F.3d 1105, 1108 (8th Cir. 2003) ("In calculating its [revocation] sentence, the district court must consider the factors set forth in 18 U.S.C. § 3553(a), which include . . . the need to promote respect for the law . . . ."); *see also United States v. Larison*, 432 F.3d 921, 923 n.3 (8th Cir. 2006) (noting but not deciding question of what factors may be considered in revocation proceeding).[6]

The Eleventh Circuit has seemingly gone even further. In *United States v. Sweeting*, 437 F.3d 1105 (11th Cir. 2006), that court held that not only *may* a

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[6] The Tenth Circuit has said the same in unpublished decisions. *See United States v. Fowler*, 222 F. App'x 738, 746 (10th Cir. 2007); *United States v. Nicholson*, No. 97-1043, 1997 WL 423123, at *1-*2 (10th Cir. July 29, 1997).

district court consider the just punishment factors, it *must* consider them in imposing a revocation sentence. *See id.* at 1107 ("Under 18 U.S.C. § 3583(e), a district court may, upon finding by a preponderance of the evidence that a defendant has violated a condition of supervised release, revoke the term of supervised release and impose a term of imprisonment after considering certain factors set forth in 18 U.S.C. § 3553(a). Section 3553(a) provides that district courts imposing a sentence *must* first consider, *inter alia*, . . . the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense . . . ." (emphasis added)). While it does not appear that reliance on the just punishment factors was challenged in *Sweeting*, the Eleventh Circuit has gone on to repeat the *Sweeting* rule in numerous subsequent revocation decisions. *See United States v. Garnett*, 238 F. App'x. 527, 529 (11th Cir. 2007) (explaining that upon sentencing for revocation of supervised release, "district courts . . . must first consider . . . the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense"); *United States v. Thomas*, 224 F. App'x. 876, 877, (11th Cir. 2007) (same); *United States v. Weaver*, 203 F. App'x. 316, 317-18 (11th Cir. 2006) (same).[7]

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[7] Other unpublished decisions, however, have not always cited the just punishment factors as among the appropriate factors for a revocation decision. *See United States v. Johnson*, No. 07-14366, 2008 WL 723781, at *2 n.3 (11th Cir. Mar. 18, 2008); *United States v. Bailey*, No. 07-10788, 2007 WL 4226400, at *2 (11th Cir. Dec. 3, 2007).

2. Regardless of the import of the decisions from the Seventh, Eighth and Tenth Circuits, the two-to-two split acknowledged by the Sixth Circuit warrants resolution by this Court.

The conflict among these circuits is considered and entrenched. As noted above, the Sixth Circuit acknowledged the contrary holdings of the Fourth and Ninth Circuits, but adopted the opposite rule of law in this case. Moreover, although petitioner pointed to the circuit split as grounds for en banc review, his petition for rehearing was denied. In addition, shortly after rejecting petitioner's petition for rehearing en banc, the Sixth Circuit reaffirmed its decision in this case, holding once again that "'it does not constitute reversible error to consider § 3553(a)(2)(A) when imposing a sentence for violation of supervised release.'" *United States v. Bolds*, 511 F.3d 568, 580 n.7 (6th Cir. 2007) (quoting Pet. App. 13a). At the same time, none of the other circuits has shown any sign of changing its established precedent. As recounted above, the Fourth and Ninth Circuit have applied their rules in numerous cases over the past two years. Similarly, a unanimous panel of the Second Circuit recently relied on its precedent in *Williams* to hold that "it is . . . permissible for [district courts] to consider the seriousness of the offense leading to revocation." *United States v. Sanders*, No. 06-2403-cr, 2008 WL 687241, at *1 (2d Cir. Mar. 13, 2008); *see also United States v. Parham*, No. 06-4855-cr, 2008 WL 501326, at *2 (2d Cir. Feb. 25, 2008) (same).

Accordingly, there is no realistic prospect of a return to uniformity without the intervention of this Court. Nor is there any reason to delay that intervention any longer. The issue has been thoroughly aired among the four circuits that have

already directly grappled with it. While other circuits will undoubtedly take up the question in future cases, there is little reason to think that those decisions will add appreciably to the debate. Instead, it is overwhelmingly likely that they, like the Sixth Circuit in this case, will simply pick a side in the existing conflict.

3. The depth of the conflict reflects the issue's recurring importance in the administration of the nation's criminal justice system.

Supervised release is an integral and increasingly important element in the federal administration of justice. In 2003, more than 75,000 federal offenders were on supervised release, up from fewer than 35,000 in 1994. Bureau of Justice Statistics, FEDERAL CRIMINAL JUSTICE TRENDS 35, tbl.27 (2003).[8] Each year, thousands of offenders are subject to revocation proceedings. In 2003, for example, district courts terminated the supervised release of more than 10,000 defendants because of technical violations or new crimes. *Id.* at tbl.29.

Because there are so many revocation proceedings each year, it is not surprising that the question presented in this case has arisen frequently. The prior section of this petition collects but a handful of the cases from seven circuits in which district courts have considered just punishment factors in revocation decisions. The issue has arisen, without resolution, in other circuits as well. The Third Circuit has adverted to the question in at least two decisions. *See United States v. Bungar*, 478 F.3d 540, 543 n.2 (3d Cir. 2007) (noting but not deciding the question); *United States*

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[8] The report is available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fcjt03.pdf (last visited Apr. 3, 2008).

v. Wogan, 228 F. App'x 214, 217 (3d Cir. 2007) (concluding that the sentencing court did not *plainly err* by referring to a factor omitted from section 3583(e) as one of the bases for a revocation sentence). And the issue was recently briefed before the D.C. Circuit in a case that was dismissed before oral argument. *See* Brief for Appellee 17-20, *United States v. Henry*, 2006 WL 3307339 (D.C. Cir. Aug. 2, 2006) (No. 05-3144).

The rate of growth in both the number of offenders on supervised release and the number of revocations guarantees that the importance of determining the proper considerations for revocation decisions will only increase over time. The total population of offenders on supervised release grew at an average annual rate of 9.3% between 1994 and 2003.[9] FEDERAL CRIMINAL JUSTICE TRENDS, *supra*, tbl.27. And the number of terminations that resulted from a technical violation or new crime in 2003 was more than 250% greater than the comparable figure in 1994. *Id.*

The ongoing division of authority over the basic considerations applicable to the revocation of supervised release is untenable. Presently, identical offenders are potentially subject to different sentences for precisely the same conduct in violation of precisely the same conditions of supervised release, based only on the happenstance of their geographic location. Such unwarranted disparate treatment of similarly situated defendants is precisely what

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[9] The table does not explicitly state the average rate of growth, but compares the number of people on supervised release in 1994 with the number in 2003. There were 34,091 in 1994 and 75,766 in 2003, resulting in an average rate of growth of 9.3%. FEDERAL CRIMINAL JUSTICE TRENDS, *supra*, tbl.27.

Congress intended section 3583(e) to minimize by setting forth uniform criteria for courts across the nation to consider when deciding whether to revoke supervised release. The current conflict directly undermines that important congressional objective and should not be allowed to endure.

4. This case presents the Court an ideal vehicle for resolving this intolerable conflict. As the court of appeals acknowledged, the district court expressly relied on the just punishment factors in setting petitioner's sentence. Pet. App. 11a; *see also* Pet. App. 32a (Sentencing Tr.) ("[K]eep in mind, this is part of your punishment."). Moreover, there is substantial reason to believe that the sentence would have been lighter if not for the reliance on the just punishment factors. The prosecution made it clear that punishment was the primary reason that it sought revocation instead of a modification or extension of the term of supervised release. *Id.* at 29a. Thus, in making his sentencing recommendation, the prosecutor relied expressly on the need for punishment, stating that "with regard to the punishment portion of [the sentence] . . . the Government would recommend the minimimum term of five months." *Id.* at 30a; *see also id.* at 29a ("The Government believes two things need to be done here. The first is that the Court should impose some form of punishment to get his attention. And, secondly, that having revoked him, the Court should then reimpose a new term of supervised release of at least two or three years."). Whether the statute allows consideration of those factors was both pressed and passed upon in the court of appeals. *See id.* at 8a-

15a.[10] Moreover, the Sixth Circuit gave the issue extensive treatment, acknowledging and attempting to rebut the analysis of the courts of appeals taking a contrary view. *See id.*

II. Review Is Also Warranted Because The Decision Below Is Wrong.

The decision below also warrants review because it is wrong, in conflict with the plain import of the text of section 3583(e) and the purposes behind it.

1. There can be little question that Congress's omission of section 3553(a)(2)(A) from the list of permissible factors in section 3583(e) was deliberate. As a general matter, the express enumeration of a number of factors for consideration would ordinarily

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[10] Below, the Government asserted that petitioner failed to timely object to his sentence in the district court and, accordingly, that his claim on appeal was subject to plain error review. Petitioner explained, however, that the district court's reliance on the just punishment factors was not revealed until the court issued its written Statement of Reasons, well after the sentencing hearing. Accordingly, because petitioner did "not have an opportunity to object to" the ruling at the time it was entered, the absence of an objection did not prejudice his right to challenge the order on appeal. Fed. R. Crim. P. 51(b). Apparently accepting petitioner's argument, the court of appeals did not apply plain error analysis, but rather applied the ordinary standard of review for objections to revocation sentences. *See* Pet. App. 8a-9a. Petitioner notes, however, that even if the court of appeals had found that petitioner could have objected to the procedural defect in his revocation sentence in the district court, the assertion that a defendant is required to challenge the procedural reasonableness of his sentence in the trial court in order to avoid plain error review on appeal is the subject of a circuit split. *See United States v. Vonner*, 516 F.3d 382, 409-10 (6th Cir. 2008) (en banc) (Moore, J., dissenting) (collecting cases).

"justify[] the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). Here, the inference of deliberate exclusion is inescapable: Congress expressly incorporated by reference every subsection of section 3553(a) except two. Had Congress intended to include all of the factors listed in section 3553(a), it presumably would have incorporated the factors in that provision in their entirety.

That, in fact, is exactly what Congress did in the provision authorizing a court to revoke probation (as distinct from supervised release). Section 3582(c)(1)(A) of Title 18 provides that the district court may revoke probation and resentence the defendant "after considering the *factors set forth in section 3553(a)*" (emphasis added). *See also* 18 U.S.C. § 3584(b) (same with respect to decision whether to impose multiple sentences consecutively or concurrently). When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate . . . exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (alteration in original) (citation and internal quotation marks omitted). There can be no claim that Congress intended courts to consider the same factors in both probation and supervised release revocation decisions when it used distinctly different language to describe the relevant factors in the two different provisions.

Nor can there be any reasonable claim that although Congress intentionally omitted the just punishment factors from the supervised release revocation provision, it nonetheless intended to

permit courts to base their decisions on those omitted factors. When Congress takes the time to identify each relevant factor in a list, an inference of exclusivity normally arises. *See, e.g., Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76 (1958); *Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999) ("A statute listing the things it does cover exempts, by omission, the things it does not list."). After all, the "listing of the factors to be considered serves to focus attention on the specific purposes of the sentencing process." S. Rep. No. 98-225, at 119 (Senate Report for Sentencing Reform Act of 1984). Where, as in this case, the list of included sentencing factors is created through incorporation of some, but not all, of the factors listed elsewhere in the statute, a strong inference arises that Congress did not intend courts to consider the factors it took great care not to incorporate in section 3583(e).

2. The natural implications of the text are confirmed by the purposes and legislative history of the statute.

The Sentencing Reform Act of 1984 created supervised release as a new form of community supervision. Pub. L. No. 98-473, 98 Stat. 1837, ch. 227, subch. D, § 3583. Congress considered and rejected the use of supervised release for punitive purposes, explaining that it "concluded that the sentencing purposes of incapacitation and punishment would not be served by a term of supervised release." S. Rep. No. 98-225, at 124. Thus, the Senate Report explained, "[t]he term of supervised release is very similar to a term of probation, except that it follows a term of imprisonment *and may not be imposed for purposes of punishment* or incapacitation since those purposes

will have been served to the extent necessary by the term of imprisonment." *Id.* at 125 (emphasis added). Thus, unlike probation, which is a form of punishment that may be imposed in lieu of incarceration, *United States v. Sampson*, 547 U.S. 843, 855 (2006) (quoting *United States v. Reyes*, 283 F.3d 446, 461 (2d Cir. 2002)), supervised release was intended "to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison." S. Rep. No. 98-225, at 124.

Accordingly, it is entirely understandable that in authorizing the district court to *impose* a term of supervised release in the first instance upon originally sentencing the defendant pursuant to 18 U.S.C. § 3583(c), Congress pointedly omitted from the list of factors to be considered the just punishment factors (just as it did when it set forth the factors to be considered in *revoking* supervised release). *Compare* 18 U.S.C. § 3583(c) *with* 18 U.S.C. § 3583(e). And as the United States Sentencing Commission has recognized, the omission of the just punishment factors from section 3583(c) makes it inappropriate for a court to consider the need for just punishment in imposing conditions of supervised release. *See* USSG Manual app. C, amend. 584 (2007) (deleting "the reference in the supervised release guideline to 'just punishment' as a reason for the imposition of curfew as a condition of supervised release" because the "need to provide 'just

punishment' is not included in [the relevant statutory language] as a permissible factor to be considered").[11]

Congress used precisely the same language to exclude consideration of the just punishment factors in responding to the breach of those conditions. *See* 18 U.S.C. § 3583(e). Congress could have chosen to treat violations of the terms of supervised release differently, subjecting them to punishment as if they were violations of the criminal code. But Congress opted for a different model. The Senate Report explained that "[i]f the violation is a new offense, the defendant may, of course, be prosecuted for the offense." S. Rep. No. 98-225, at 125.[12] But the violation of the term of supervised release – often, as in this case, in the form of relatively minor, non-criminal conduct – was intended to be dealt with in light of the non-punitive, rehabilitative purposes supervised release serves.

Thus, in its policy guidance for revocation of supervised release, the United States Sentencing Commission has explained that "imposition of an appropriate punishment for any new criminal conduct

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[11] The text of Amendment 584 is available at http://www.ussc.gov/1998guid/appcsupp.pdf (last visited Apr. 3, 2008).

[12] As originally enacted, the statute did not permit revocation of supervised release in response to a violation. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 3583. The revocation option was added a short time later, as one of several "miscellaneous technical amendments" to the Sentencing Reform Act in the Anti-Drug Abuse Act of 1986. Pub. L. No. 99-570, 100 Stat. 3207, § 1006(a). Importantly, however, in adding revocation as a potential response to violations of the terms of supervised release, Congress retained the original set of factors and maintained the parallel with the provision authorizing the initial imposition of a term of supervised release.

[is not] the primary goal of a revocation sentence." USSG Manual ch. 7, pt. A, cmt. 3(b) (2007). Hence, the Sentencing Commission rejected an approach that treated changes to supervised release as "sanction[s] . . . for the particular conduct triggering the revocation as if that conduct were being sentenced as new federal criminal conduct." *Id.* Instead, the Commission explained, Congress intended for district courts to treat the defendant's "failure to follow the court-imposed conditions of . . . supervised release as a 'breach of trust.'" *Id.* Revoking supervised release – or extending it, or modifying its terms – in response to a violation is meant to further the purpose underlying supervised release in the first place: the successful reintegration of the defendant into society. Accordingly, in this context, re-incarceration is intended to serve a rehabilitative – not punitive – purpose, as reflected in the exclusion of the just punishment factors from section 3583(e).

3. The Sixth Circuit nonetheless hypothesized that Congress selectively incorporated only a portion of the section 3553(a) factors because it intended to *require* the district court to consider those factors, but to leave to the district court's discretion whether to consider the excluded factors. *See* Pet. App. 13a-14a.

To be sure, Congress did not expressly state that the listed considerations are the "only" factors that can be considered or that the excluded factors cannot be considered. But Congress rarely, if ever, tells a court that it may consider "only" certain factors. Nor need it do so, given that the background principle of *expressio unius alterius exclusius* will ordinarily ensure that factors excluded are not considered. On the other hand, when Congress lists factors to be considered, yet intends to permit consideration of additional factors as well, it often says so. *See, e.g.*,

18 U.S.C. § 3162(a)(1) (providing that in deciding whether to dismiss an indictment for speedy trial violations the "court shall consider, *among others*, . . . the following factors . . . .") (emphasis added); 12 U.S.C. § 4010(b) ("In determining the amount of any award in any class action, the court shall consider, among other relevant factors — . . . ."); 15 U.S.C. § 1640 (same).

As described above, the more natural inference – supported by general principles of construction as well as the purposes of the Act – is that Congress excluded consideration of the just punishment factors because it intended to preclude their consideration in the revocation decision.

4. The court of appeals also concluded that it was not error for the district court to consider the just punishment factors excluded from Section 3583(a) because those factors were "essentially redundant with matters courts are already permitted to take into consideration when imposing sentences for violation of supervised release." Pet. App. 14a. That conclusion is also flawed.

First, it is a "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Accordingly, a court should not lightly conclude that Congress has enacted words – much less entire subsections – that add no meaning to a statute. Here, Congress obviously thought that the just punishment factors identified importantly distinct considerations that were not only worth

separate mention in section 3553(a)(2)(A), but also worthy of exclusion from section 3583(e).

Second, the court of appeals was simply wrong to conclude that the just punishment terms were redundant. While it is true that a court may consider the "circumstances of the offense," 18 U.S.C. § 3553(a)(1), inclusion of that factor does not, as the court of appeals assumed, render meaningless Congress's decision to exclude the just punishment factors from consideration. As the Ninth Circuit has explained, it is perfectly sensible to construe the statute to permit a district court to consider the circumstances surrounding an offense, while also precluding it from imposing "a revocation sentence *solely*, or even primarily, based on the severity of the new criminal offense underlying the revocation, as the sentence for that offense is left to the sentencing court." *Simtob*, 485 F.3d at 1063 (emphasis in original).

The Sixth Circuit's citation to this Court's decision in *Johnson v. United States*, 529 U.S. 694 (2000), is likewise misplaced. *See* Pet. App. 14a. In *Johnson*, the Court recognized that supervised release is intended to provide assistance to an inmate in reintegrating into society after a term of imprisonment. 529 U.S. at 709. In the Sixth Circuit's view, teaching a supervisee to respect the law – by punishing him with imprisonment for violation of the terms of his supervised release – is the kind of "help" a defendant needs. Pet. App. 14a. Accordingly, the court of appeals held, a district court may appropriately revoke supervised release "to promote respect for the law," 18 U.S.C. § 3553(a)(2)(A), even though Congress expressly excluded that consideration from the list of revocation factors in section 3583(e). *See* Pet. App. 14a. But if

Congress intended district courts to help defendants integrate into the community by punishing them with incarceration for violation of the terms of their supervised release, there would have been no need to exclude from the list of considerations for revocation decisions the need to "promote respect for the law." Instead, the exclusion of that factor demonstrates that Congress intended for that purpose to be served through a separate criminal prosecution when the violation constitutes an independent criminal offense and for non-criminal violations of the terms of supervised release to be treated as breaches of trust that may reflect a need for further intervention before the defendant is returned unsupervised to the community.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ronald C. Small
Michael C. Holley
OFFICE OF THE FEDERAL PUBLIC DEFENDER
810 Broadway Street
Suite 200
Nashville, TN 37203

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913

April 11, 2008

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, *Plaintiff-Appellee*,	*	
v.	*	No. 06-6011
Terrance L. Lewis, *Defendant-Appellant.*	*	

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 03-00099—Robert L. Echols, District Judge.

Argued: July 18, 2007
Decided and Filed: August 13, 2007

Before: MARTIN and McKEAGUE, Circuit Judges;
GREER, District Judge.*

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* The Honorable J. Ronnie Greer, United States District Judge for the Eastern District of Tennessee, sitting by designation.

McKEAGUE, Circuit Judge.

Defendant appeals the revocation of his supervised release, arguing that the district court incorrectly interpreted the conditions of supervised release and relied on improper considerations in determining his sentence. For the reasons stated below, Defendant's conviction and sentence are affirmed.

I. BACKGROUND

On September 5, 1995, Defendant Terrance Lamont Lewis pled guilty to one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). He was sentenced on November 30, 1995, by the United States District Court for the Middle District of Georgia to 137 months' imprisonment, followed by five years of supervised release. Among the "standard conditions" of supervised release the court imposed was that "the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer." Judgment of Nov. 30, 1995, at 3. On June 4, 1999, Defendant's sentence was reduced to 92 months by order of the court. Defendant began serving his supervised release term on October 26, 2001, in Tennessee; on June 5, 2003, jurisdiction over his supervised release was formally transferred from the Middle District of Georgia to the Middle District of Tennessee.

On February 16, 2006, the United States Probation Office filed a petition for summons of Defendant with the district court alleging that he had

committed multiple violations of his supervised release. At a hearing on May 1, 2006, the district court held that Defendant had violated the conditions that he "notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer"; that he "submit a truthful and complete written report within the first five days of each month"; that he "answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer"; and that he "permit the probation officer to visit him at home or elsewhere." Tr. at 60-63. Defendant was sentenced to six months of in-home detention, followed by twenty-four months of supervised release. He now appeals both the finding of violation and the sentence.

II. VIOLATION OF SUPERVISED RELEASE

This court reviews a district court's decision to revoke supervised release for abuse of discretion. *United States v. Carr*, 421 F.3d 425, 429 (6th Cir. 2005) (quoting *United States v. Webb*, 30 F.3d 687, 688 (6th Cir. 1994)). Defendant first disputes the district court's determination that he violated the supervision condition that he "permit a probation officer to visit him . . . at any time at home or elsewhere." Judgment of Nov. 30, 1995, at 3. The court found that he violated this condition because he expressly refused to give the probation officer the address at which his two daughters resided, and at which he spent up to several nights per week. Defendant points out that the statute listing

discretionary conditions of probation[1] which the court "may" impose includes the condition that a defendant "permit a probation officer to visit him at his home or elsewhere *as specified by the court.*" 18 U.S.C. § 3563(b)(16) (emphasis added). The 1995 sentence did not name any specific locations other than his home. Defendant argues, in essence, that the condition in his case should be read as if it included the italicized words even if it did not in fact include them; that if interpreted without the italicized words, the condition would have involved a "greater deprivation of liberty than is reasonably necessary" for the purposes of supervised release in violation of 18 U.S.C. § 3583(d)(2); and that because the original sentence did not specify any locations other than his home, he did not violate the condition by refusing to provide the probation officer with the address at which his daughters resided so that she could visit him there.

Defendant's arguments suffer from a number of flaws. Principally, as the government points out, Defendant is attempting to use this appeal of the revocation of his supervised release to challenge the reasonableness of his original sentence imposed in 1995. The proper vehicle for such a challenge, after the lapse of the ten-day period for filing a notice of direct appeal, Fed. R. App. P. 4(b)(1)(A), would be the habeas corpus procedure provided in 28 U.S.C. §

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[1] The statute providing mandatory and discretionary conditions of supervised release references the conditions of probation in 18 U.S.C. § 3563(b) as "further condition[s] of supervised release" that a court "may order." 18 U.S.C. § 3583(d).

2255. As the Sixth Circuit has noted in unpublished cases, an appellant may not "attempt to invalidate his original conviction at a supervised release revocation hearing." *United States v. Meacham*, 65 F. App'x 529, 533 (6th Cir. 2003); *see also United States v. Flanory*, 45 F. App'x 456, 459 (6th Cir. 2002). We are thus limited to reviewing the district court's determination that Defendant violated the condition at issue.

Defendant's citation to § 3563(b)(16) is not instructive with regard to the correct understanding of the supervision condition at issue here. As noted above, the discretionary supervision conditions in § 3563(b) are named in § 3583(d) as conditions that the court "may order" in addition to the mandatory supervised release conditions; a court may also order "any other condition it considers to be appropriate." 18 U.S.C. § 3583(d).[2] Thus, courts are not bound to adopt the discretionary considerations under the wording used in § 3563(b), and the district court need not have supposed that the words "as specified by the court" are therefore implicitly included in the condition in this case.

Moreover, the permit-to-visit condition on Defendant's supervised release does not appear to be

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[2] All conditions of supervised release, other than the mandatory conditions, must be consistent with the sentencing considerations laid out in § 3553(a)(1), and (a)(2)(B)-(D), "involve[] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in" § 3553(a)(2)(B)-(D), and be "consistent with any pertinent policy statements issued by the Sentencing Commission." 18 U.S.C. § 3583(d).

taken from § 3563(b) at all. According to the policy statements regarding sentences of supervised release, several "'standard' conditions are recommended for supervised release." U.S.S.G. § 5D1.3(c). Among these is § 5D1.3(c)(10), "[T]he defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer." It is this version of the condition that was included in Defendant's 1995 sentence, as indicated by the fact that the condition includes the "and shall permit confiscation" clause, which appears in § 5D1.3(c)(10) but not § 3563(b)(16); the fact that the condition appears in Defendant's 1995 sentence under the heading "Standard Conditions of Supervision," consistent with the recommendation of § 5D1.3(c); and the fact that the visit condition appears in a list with the other standard conditions[3] recommended by § 5D1.3(c), almost verbatim. Unlike the discretionary condition in § 3563(b)(16), the condition in § 5D1.3(c)(10) does not contain the words "as specified by the court." The wording of the visit condition on Defendant's supervised release sentence thus was not only permissible, but identical to the wording of the standard condition provided in the Guidelines.

The question is therefore whether the requirement that the condition that Defendant "permit a probation officer to visit him . . . at any

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[3] Excepting the last two, which have to do with the payment of restitution, fines, or special assessments. U.S.S.G. § 5D1.3(c)(14), (15). Defendant's sentence included only an assessment of $50.

time at home or elsewhere," as written, was violated by Defendant's conceded refusal to give his probation officer the address at which his minor daughters resided, despite the fact that by his own admission Defendant spent as many as "several nights a week" there. Tr. at 51. Defendant contends in this regard that "or elsewhere" could be read to "allow the probation officer . . . to visit the subject wherever he or she pauses long enough to be visited; the officer could visit a traveling sales representative in her hotel room, could visit a vacationer at a family beach retreat, or could visit a subject at the homes of each and every acquaintance he visited." Appellant's Brief at 19. While these examples do not sound as unreasonable as Defendant doubtless means them to, especially in view of the requirement that Defendant permit the probation officer to visit "at any time," these sorts of visits are not at issue here. The only visits in which the probation officers in this case were interested were visits to Defendant's reported residence, to his workplace, and to the unreported address of his daughters at which he spent as many as half the nights in a week, and at which his probation officer believed he primarily resided. Notably, Defendant does not contend that it was unreasonable for probation officers to visit him at work, although his place of employment is not specified in the supervision conditions as a location at which he must permit visits.

The district court explained that it found a violation of the visit requirement because "[w]here he physically is and allows himself to be visited is the importance of the requirement. And it frustrates the purpose of supervision when one does not allow

himself or herself to be supervised except at his or her own choosing." Tr. at 63. This is consistent with what the Supreme Court has recognized to be the purpose of supervised release. The Court explained in *Johnson v. United States*, 529 U.S. 694, 708-09 (2000), that "[t]he congressional policy in providing for a term of supervised release after incarceration is to improve the odds of a successful transition from the prison to liberty." Supervised release is essentially rehabilitative, and is not intended for punishment. *Id.* at 709; *see also United States v. Page*, 131 F.3d 1173, 1184 (6th Cir. 1997) (quoting 1984 U.S.C.C.A.N. (98 Stat.) 3182, 3308). The transition to liberty is facilitated by "postconfinement assistance" such as, for example, a requirement that a subject "avoid possessing or transporting firearms." *United States v. Johnson*, 529 U.S. 53, 60 (2000).

The district court's determination that the condition that Defendant permit his probation officer to visit him "at home or elsewhere" required him to provide his secondary address and that his refusal to do so frustrated the purposes of supervision is a perfectly reasonable reading of the supervision condition and is consistent with the recognized purposes of supervision. The district court thus did not abuse its discretion in finding that Defendant violated the visit condition of his supervised release.

III. APPROPRIATENESS OF SENTENCE

The Sixth Circuit has not yet determined whether sentences for violation of supervised release are to be reviewed under the "plainly unreasonable" standard the Circuit employed for these sentences before the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005), or the "unreasonableness" standard

applicable to sentences under the Guidelines post-*Booker*. *See United States v. Yopp*, 453 F.3d 770, 772-73 (6th Cir. 2006); *United States v. Kirby*, 418 F.3d 621, 625 n.3 (6th Cir. 2005); *United States v. Johnson*, 403 F.3d 813, 817 (6th Cir. 2005). Instead, the court has held in particular cases that "[w]hether we apply a 'reasonableness' standard of review or a 'plainly unreasonable' standard, no error occurred." *See, e.g.*, *Johnson*, 403 F.3d at 817.

Under the pre-*Booker* standard for revocation sentences, "[a] district court's sentence of imprisonment upon revocation of supervised release should be affirmed 'if it shows consideration of the relevant statutory factors and is not plainly unreasonable.'" *Carr*, 421 F.3d at 429 (quoting *United States v. McClellan*, 164 F.3d 308, 309 (6th Cir. 1999)). Under the post-*Booker* standard for Guidelines-based (non-revocation) sentences, sentences must be both procedurally and substantively reasonable. Procedural reasonableness requires the sentencing court to consider "the applicable Guidelines range" and "the other factors listed in 18 U.S.C. § 3553(a)." *United States v. Esteppe*, 483 F.3d 447, 450 (6th Cir. 2007). "A sentence is substantively unreasonable if the district court 'selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent § 3553(a) factors or gives an unreasonable amount of weight to any pertinent factor.'" *United States v. Husein*, 478 F.3d 318, 332 (6th Cir. 2007) (quoting *United States v. Caver*, 470 F.3d 220, 248 (6th Cir. 2006)). In this case, as in *Johnson*, we do not reach the question of which standard applies to

review of revocation sentences, as the district court did not err under either standard.

Defendant challenges the district court's sentence of six months of home detention and twenty-four months of supervised release following revocation of his supervised release. As the government notes, Defendant received a far lighter sentence than he might have under the advisory policy statements for violation of supervised release. Based on his criminal history, Defendant's policy statement range was five to eleven months of incarceration. U.S.S.G. § 7B1.4(a). The district court chose an imprisonment term at the low end of the policy statement range, and elected in its discretion under U.S.S.G. § 7B1.3(c)(1) to allow Defendant to serve the entire incarceration sentence on home detention rather than in a correctional facility. Defendant argues, however, that the district court arrived at the sentence improperly because the court based its sentence in part on the goal of promoting respect for the law, and this is not one of the statutory factors to be considered.

The statute governing supervised release provides, "The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7), . . . revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release . . . ." 18 U.S.C. § 3583(e)(3). The factors cited are "the nature and circumstances of the offense and the history and characteristics of the defendant"; "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the

defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"; the sentence ranges in the policy statements for violation of supervised release; other relevant policy statements regarding sentencing; "the need to avoid unwarranted sentence disparities"; and "the need to provide restitution to any victims of the offense." *Id.* § 3553(a). The only factors in § 3553(a) which § 3583(e) does not require to be considered upon violation of supervised release are (a)(3), "the kinds of sentences available," and (a)(2)(A), "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

In its written statement of reasons for imposing the sentence, the district court explained,

> The reasons for the sentence imposed are as follows: to reflect the seriousness of the offense; to promote respect for the law; to provide just punishment; to provide an adequate deterrence to this Defendant and others from criminal conduct; and to protect the public from future crimes of this Defendant and of others who may participate in similar offenses.

Judgment of May 1, 2006, at 3. Of these five reasons, the first three clearly come from § 3553(a)(2)(A), which is not a factor listed for consideration in § 3583(e). Defendant contends that because this factor is not included in § 3583(e), a sentencing court "is prohibited from acting with [a] purpose" listed in § 3553(a)(2)(A). Appellant's Brief at 21. The question is therefore whether the consideration of a factor other

than those enumerated in § 3583(e) renders a sentence unreasonable or plainly unreasonable.

This question has been previously raised in the Sixth Circuit in three unpublished cases. While these opinions have implicitly credited the argument that § 3553(a)(2)(A) may not be considered when sentencing a defendant for violation of supervised release, none of them have squarely held that consideration of that factor is unreasonable. In *United States v. Jiles*, No. 06-5832, 2007 U.S. App. LEXIS 8270, at *7 (6th Cir. Apr. 6, 2007), the court stated, "Omitted from the list of permissible factors [in § 3583(e)] is the need 'to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense'" enumerated in § 3553(a)(2)(A). The court simply held, however, that "the [district] court mentioned the seriousness of the offense one time in the midst of considering the permissible factors. Further, the nature and circumstances of the offense are factors the court may consider . . . ." *Id.* at 404. Thus, the court found no error because the information the district court considered could have been considered under § 3553(a)(1), which is listed in § 3583(e).

In *United States v. Henley*, 191 F. App'x. 377, 381 (6th Cir. 2006), the "defendant argue[d] that the district court relied on § 3553(a)(2)(A), an unauthorized factor pursuant to § 3583(e)." However, the court did not address the question of whether § 3553(a)(2)(A) could be considered, and simply held that there was no error because the facts considered by the district court could also appropriately be considered under § 3553(a)(1) or § 3553(a)(2)(C). *Id.* at 381-82. In *United States v. Morrow*, 207 F. App'x

591, 594 (6th Cir. 2006), the defendant also argued that the district court had "erroneously considered an impermissible factor," which there also was § 3553(a)(2)(A). Again, the court did not determine whether § 3553(a)(2)(A) could be considered, and held that the district court's explanation for the sentence "reflected appropriate rehabilitative considerations, not punitive ones." *Id.*

Of the other circuits which have addressed the question of whether factors not included in § 3583(e) can be considered, the Second has "interpret[ed] § 3583(e) simply as requiring consideration of the enumerated subsections of § 3553(a), without forbidding consideration of other pertinent factors," including § 3553(a)(2)(A). *United States v. Williams*, 443 F.3d 35, 47 (2d Cir. 2006). The Third Circuit referred to the Williams decision in a footnote without rejecting or adopting it. *United States v. Bungar*, 478 F.3d 540, 543 n.2 (3d Cir. 2007). By contrast, the Fourth Circuit has held that "in devising a revocation sentence the district court is not authorized to consider" § 3553(a)(2)(A). *United States v. Crudup*, 461 F.3d 433, 439 (4th Cir. 2006). Likewise, the Ninth Circuit held that "a sentence would be unreasonable if the court based it primarily on an omitted factor, such as a factor provided for in § 3553(a)(2)(A)." *United States v. Miqbel*, 444 F.3d 1173, 1182 (9th Cir. 2006).

We now adopt the Second Circuit's position. That is, we hold that it does not constitute reversible error to consider § 3553(a)(2)(A) when imposing a sentence for violation of supervised release, even though this factor is not enumerated in § 3583(e). First of all, § 3583(e) provides merely that the court "may, after

considering the [specified] factors . . . revoke a term of supervised release." It does not state that a court may revoke supervised release after "*only* considering" the enumerated factors. Second, the three considerations in § 3553(a)(2)(A), namely the need "to reflect the seriousness of the offense," "to promote respect for the law," and "to provide just punishment for the offense," are essentially redundant with matters courts are already permitted to take into consideration when imposing sentences for violation of supervised release.

First, as several cases have recognized, courts are already authorized to consider the seriousness of the offense under § 3553(a)(1), which requires consideration of "the nature and circumstances of the offense." *See, e.g.*, *Jiles*, 2007 U.S. App. LEXIS 8270, at *7-8; *Henley*, 191 F. App'x at 381-82; *United States v. Johnson*, 190 F. App'x 724, 726 (10th Cir. 2006). Second, in *Johnson v. United States*, the Supreme Court observed that "[a] violation of the terms of supervised release tends to confirm the judgment that help was necessary, and if any prisoner might profit from the decompression stage of supervised release, no prisoner needs it more than one who has already tried liberty and failed." 529 U.S. at 709 (holding that further supervised release may be ordered as a sentence for violation of supervised release). The "help" a further supervised release sentence provides to a defendant who has once violated supervised release is that he learn to obey the conditions of his supervised release – in other words, that he learn to respect the law.

Finally, in the official introduction to the policy statements regarding supervised release, the

Sentencing Commission explains that "the sentence imposed upon revocation . . . [is] intended to sanction the violator for failing to abide by the conditions of the court-ordered supervision." 18 U.S.C. App'x § 3(b). Thus, although violations of supervised release generally do not entail conduct as serious as crimes punishable under the § 3553(a) regime, revocation sentences are similarly intended to "sanction," or, analogously, to "provide just punishment for the offense" of violating supervised release. Given that the three considerations in § 3553(a)(2)(A) are consistent with considerations already permissible for revocation sentences, the fact that § 3583(e) does not require that courts consider § 3553(a)(2)(A) does not mean that courts are forbidden to consider that factor, and the fact that a sentencing court does consider § 3553(a)(2)(A) is not error.

The sentence in this case was thus neither unreasonable nor plainly unreasonable. The district court sentenced Defendant toward the bottom of the policy statement range, exercised its discretion to permit him to serve his incarceration sentence in home confinement so he could keep his job and continue to see his children, and based its sentence of further supervised release on the need for Defendant to learn to adjust to and abide by the terms of supervision. The district court took into consideration the policy statement range, Defendant's situation, including his work and family responsibilities, the nature of his violations and his behavior under supervision, and the need for him to learn to cooperate with supervision, and rendered a sentence that was carefully considered and commensurate with his violations.

IV. CONCLUSION

For these reasons, the judgment of the district court is **AFFIRMED**.

No. 06-6011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, *Plaintiff-Appellee,*	*	
v.	*	ORDER
Terrance L. Lewis, *Defendant-Appellant.*	*	

Before: MARTIN and McKEAGUE, Circuit Judges; and GREER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* The Honorable J. Ronnie Greer, United States District Judge for the Eastern District of Tennessee, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

United States District Court

MIDDLE District of TENNESSEE

UNITED STATES OF AMERICA

V.

TERRANCE LAMONT LEWIS

JUDGMENT IN A CRIMINAL CASE
(*REVOCATION OF SUPERVISED RELEASE*)

Case Number: 3:03-00099

USM Number: 85592-020

RONALD SMALL
Defendant's Attorney

THE DEFENDANT

___ pleaded guilty to count(s) _____

___ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X **was found guilty of the following violations of supervised release:**

Failure to report to notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer (Defendant failed to notify the probation officer of his contact with law enforcement officers of the Metro Nashville Police Department).

Failure to report to the probation officer and submit a truthful and complete written report within the first

five days of the month (Defendant failed to submit reports on December 2003, April 2005, and January 2006; he failed to disclose the purchase of a white Suzuki motorcycle; and he failed to admit spending the majority of his time residing at a residence other than his reported residence of 1225 Kermit Drive, Nashville, Tennessee).

Failure to answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer (Defendant refused to provide the alternate address where he resides for the majority of the week even after admitting that he did not stay at his reported residence more than a "couple of nights per week.").

Failure to permit the probation officer to visit him at home or elsewhere (Defendant refused to provide residential information which would allow the probation officer to conduct home contacts at the residence where he admittedly spends the majority of his time).

_X_ was found not guilty of the <u>following violations of supervised release</u>:

Committing another federal, state, or local crime.

1) Defendant was cited on December 20, 2003 for expired registration, registration not in vehicle, unlawful use of license plates, and driving an unregistered vehicle. All citations were dismissed on January 27, 2004.

2) Defendant was cited on April 15, 2006, for careless driving, registration not in vehicle, and turn signal required. Citations were dismissed upon attendance at traffic school.

3) Defendant was cited on January 19, 2006, for speeding 20 mph in a 15 mph zone. A court date was set for March 6, 2006. Failure to notify the probation officer 10 days prior to any change in residence or employment.

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, defendant shall notify the court and United States attorney of any material change in economic circumstances.

May 1, 2006
Date of Imposition of Judgment

/s/ Robert L. Echols
Signature of Judge

Robert L. Echols, U.S. District Judge
Name and Title of Judge

July 5, 2006
Date

(Judgment continues on next page →)

Defendant: 3:03-00[illegible]39
Case Number: Terrance Lamont Lewis

Imprisonment

Pursuant to § 7B1.3(c)(1) of the Sentencing Guidelines, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of six (6) months, which is to be satisfied by a term of home detention. The term of home detention shall be served immediately and shall be included within the term of supervised release imposed by the Court (see Special Conditions of Supervised Release).

____ The court makes the following recommendations to the Bureau of Prisons:

_____ The defendant is remanded to the custody of the United States Marshal.

_____ The defendant shall surrender to the United States Marshal for this district:

____ at _____ ___a.m. ___p.m. on _____

____ as notified by the United States Marshal.

____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

____ before 2 p.m. on _____.

____ as notified by the United States Marshal.

____ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

(Judgment continues on next page →)

Defendant: 3:03-00099
Case Number: Terrance Lamont Lewis

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of thirty (30) months. (See special conditions of supervised release.)

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

____ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

__X__ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

____ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

____ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works or is a student, as directed by the probation officer. (Check, if applicable.)

____ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments page of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as the additional Special Conditions supervision on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia

related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may by occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

(Judgment continues on next page →)

Defendant: 3:03-00099
Case Number: Terrance Lamont Lewis

SPECIAL CONDITIONS OF SUPERVISION

1. **The Defendant shall participate in and successfully complete a program of home detention. Defendant is being sentenced to home detention for six months in lieu of being incarcerated in jail primarily so he can retain his good-paying truck driving job. But during this period of home detention, Defendant shall abide by all rules and requirements as directed by the U.S. Probation Office, specifically including presenting himself for supervision and reporting at all appointed times and to answer truthfully and completely all inquiries by the U.S. Probation Officer. The Defendant is restricted to his residence at all times except for special activities approved in advance by the U.S. Probation Officer, such as employment; education; religious services; medical, substance abuse, or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as pre-approved by the U.S. Probation Officer. Unless specifically approved, Defendant shall remain at home between the hours of 8:00 p.m. and 6:00 a.m. The Defendant shall furnish any documentation as requested which supports or verifies any leave from his residence.**

2. **Defendant may be subject to electronic monitoring at the direction of the probation officer.**

3. **Defendant is prohibited from owning, carrying or possessing firearms, destructive devices, or other dangerous weapons.**

4. **Defendant shall provide the probation officer access to any requested financial information.**

5. **Defendant shall cooperate in the collection of DNA as directed by the probation officer.**

6. **Defendant shall participate in a program approved by the U.S. Probation Officer of urinalysis testing to determine whether Defendant is using alcohol or drugs, and, if necessary, treatment for alcohol or drug addiction or dependency.**

EXCERPTS FROM REVOCATION SENTENCING HEARING

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 3:03-CR-00099
v.	)	C.O.A. No. 06-611
TERRANCE LAMONT LEWIS,	)	Volume 1
Defendant.	)	

BEFORE THE HONORABLE ROBERT L. ECHOLS
TRANSCRIPT OF PROCEEDINGS
MAY 1, 2006

* * *

MR. DENEKE: Your Honor, the applicable guideline range here, I believe, is five to eleven months.

The Government believes two things need to be done here. The first is that the Court should impose some form of punishment to get his attention. And, secondly, that having revoked him, the Court should then reimpose a new term of supervised release of at least two or three years.

With regard to the punishment portion of that, Your Honor, he has had a job. These aren't the worse offenses we've ever seen in a supervised release context. The Government would recommend the minimum term of five months. And we would have no objection to the Court recommending to the Bureau of Prisons that he be allowed to serve that five months in a halfway house.

Furthermore, Your Honor, given his local roots, we would have no objection to the Court, if you so choose, giving him 10 days or so to self report to that sentence, to give the Bureau of Prisons time to arrange a halfway house type setting.

Again, Your Honor, I think that the important thing here is to do something to get his attention, to put him back on a term of supervised release that he can successfully complete, and to then and only then release him from his supervised release obligation.

THE COURT: Thank you, Mr. Deneke.

All right. Mr. Small, if you and Mr. Lewis will stand, the Court will now state the sentence.

It is the judgment of the Court that the defendant, Terrance Lamont Lewis, is hereby committed to the Bureau of Prisons, to be imprisoned for a term of six months.

The sentence is being imposed under Section 7B1.3(c)(1) of the Sentencing Guidelines, which provides that for a Grade C violation the Court has the option of satisfying the revoked supervised release in the sentence by a sentence of imprisonment or a sentence of imprisonment that includes a term of supervised release with a condition that substitutes

community confinement or home detention in lieu of that imprisonment.

In this case, the Court will exercise its option and discretion and rule that Mr. Lewis shall serve his six months sentence in home detention. And that will be included as a term of the supervised release in substitution for the otherwise imprisonment.

Upon release from this substituted sentence of home detention, he will be placed on normal supervised release for a term of 24 months. So there will be a total of 30 months of supervised release, the first six months of which will be served as home detention.

Home detention, Mr. Lewis, means that you are serving your six months prison sentence at home. And having experience in serving time, there will be a great deal of difference between serving it at home and serving it in prison. But I want you t understand that when you are chafing under the collar of home detention that your remember that it could be in prison.

You'll be able to go to work. You've got a good job. Apparently, you are a good worker. That's to your credit. And it's because of that, largely, that the Court wants you to try to ensure, to the extent I can, that you keep that employment. You apparently are doing well in it. And you are fortunate to have a job that you are doing well in. So this home detention will allow you to continue to go to work.

Upon the approval of the probation officer, you may be able to attend other events, such as your children's activities, so long as they do not require you to be out of the home past 8:00pm.

You are to be at home from 8:00 p.m. to 6:00 a.m. every day for six months, unless you have the express approval by the probation officer to do otherwise.

And keep in mind, this is part of your punishment. This is not some kind of social experiment. So the Court is going to monitor it simply by any reports I receive from the probation officer.

Mr. Lewis, this is not a dodge and dart kind of exercise. Ms. Eastes is not out to get you. She's got a job to do. She works for the Court. And I suspect she's going to do her job. She may be a nuisance to you. It may be inconvenient to you. You are going to have to put up with her, but you are not being picked on. Everybody's that's under supervision has to undergo the same kind of scrutiny for that period of time.

So whatever you've kind of had in your craw about that, I hope you can take a big swallow and get it out of your craw so you can go through this period without having all that heartburn and taking that kind of argumentative, defiant stance about she's not going to know where you are.

Now, I don't know where you are going to stay for this six months. But wherever it is, make sure you let Ms. Eastes know. Because that's where you are going to have to be for six months. It's not going to be I'll be here tonight and I'll be somewhere else tomorrow night.

I'm not going to dictate where you are. You'll have to make that choice. But make sure that Ms. Eastes knows where it is. And you'll have to spend the night there every night for six months. But,

again, it's part of the alternative of having your supervised release revoked.

It seems to me that you are on the right track, from all I can tell. It's a good thing that you are in the lives of your daughters. It's good fro them and it's good for you. But where you were, you were at fault. You've made a serious mistake. You may have thought you were protecting them, but you're really not protecting them if you have to go back to prison. Because they need you and you want to be with them.

You are just going to have to endure this inconvenience for this period of time. Not only for the six-month period of home detention, but for the 24-month period of continued supervised release that will follow this period of home detention.

Do you or Mr. Small have any questions about the home detention?

* * *

Statutory Appendix

18 U.S.C. § 3553

18 U.S.C. § 3553 provides in relevant part:

(a) Factors to be considered in imposing a sentence

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense. * * * *

18 U.S.C. § 3583

18 U.S.C. § 3583 provides in relevant part:

(a) In general

The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release

Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release

The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) Conditions of supervised release

The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The

results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation

The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is

warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is

a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions

The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing

If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation

When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.* * *

(3)

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SUPREME COURT, U.S.

No. 07-1295

In the Supreme Court of the United States

TERRANCE LAMONT LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

According to 18 U.S.C. 3583(e)(3) (2000 & Supp. V 2005), when a district court finds that a defendant violated a condition of supervised release, it "may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)[,] * * * revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release." Section 3553(a)(2)(A), which is not listed among the sections that the district court must consider, refers to the need for a sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

The question is whether the district court erred, upon the revocation of petitioner's supervised release, when it included the considerations stated in 18 U.S.C. 3553(a)(2)(A) among the multiple reasons for the sentence it imposed.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 498 F.3d 393.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2007. A petition for rehearing was denied on December 21, 2007 (Pet. App. 17a-18a). On March 14, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 18, 2008, and the petition was filed on April 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a hearing, the United States District Court for the Middle District of Tennessee revoked petitioner's

term of supervised release and sentenced him to six months of home detention followed by 24 months of supervised release. The court of appeals affirmed. Pet. App. 1a-16a.

1. When a district court determines that a defendant has "violated a condition of supervised release," it "may, after considering the factors set forth in [18 U.S.C.] 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)[,] * * * revoke [the] term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release." 18 U.S.C. 3583(e)(3) (2000 & Supp. V 2005). The factors enumerated in Section 3583(e) are:

> the nature and circumstances of the offense and the history and characteristics of the defendant,

18 U.S.C. 3553(a)(1);

> the need for the sentence imposed * * * to afford adequate deterrence to criminal conduct,

18 U.S.C. 3553(a)(2)(B);

> the need for the sentence imposed * * * to protect the public from further crimes of the defendant,

18 U.S.C. 3553(a)(2)(C);

> the need for the sentence imposed * * * to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner,

18 U.S.C. 3553(a)(2)(D);

> the kinds of sentence and the sentencing range established for[,] * * * in the case of a violation of

> probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. 994(a)(3), which includes guidelines and policy statements about the revocation of supervised release],

18 U.S.C. 3553(a)(4)(B) (Supp. V 2005);

> any pertinent policy statement * * * issued by the Sentencing Commission pursuant to [28 U.S.C. 994(a)(2), which applies to any aspect of sentencing that would further the purposes of 18 U.S.C. 3553(a)(2)],

18 U.S.C. 3553(a)(5)(A) (Supp. V 2005);

> the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,

18 U.S.C. 3553(a)(6); and

> the need to provide restitution to any victim of the offense,

18 U.S.C. 3553(a)(7). Section 3583(e) omits required consideration of the factors identified in 18 U.S.C. 3553(a)(2)(A), which addresses "the need for the sentence imposed * * * to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. 3553(a)(2)(A).

2. On September 5, 1995, after a guilty plea, petitioner was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a. On November 30, 1995, he was sentenced to 137 months of imprisonment to be followed by five years of supervised release. *Ibid.* On June 4, 1999, the sen-

tencing court reduced petitioner's term of incarceration to 92 months of imprisonment.[1] *Ibid.* Petitioner began serving his five-year term of supervised release on October 26, 2001. *Ibid.*

3. On February 16, 2006, the United States Probation Office filed a petition to revoke petitioner's supervised release, on the basis of multiple violations of the conditions of release. Pet. App. 2a-3a. After a hearing, the district court found that petitioner had violated the conditions of his supervised release by (1) failing to "notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer"; (2) failing to "submit a truthful and complete written report within the first five days of each month" on multiple occasions; (3) failing to "answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer" by refusing to provide the "address where he reside[d] for the majority of the week even after admitting that he did not stay at his reported residence more than 'a couple nights per week'"; and (4) failed to "permit the probation officer to visit him at home or elsewhere." *Id.* at 3a, 19a-20a.

On the basis of petitioner's criminal history and the nature of his violations of supervised release, the applicable policy statement of the United States Sentencing Commission recommended, upon revocation of supervised release, a term of imprisonment between 5 and 11 months, Sentencing Guidelines § 7B1.4(a), though it also recommended that the district court use its discretion to determine that any term of detention of six months or

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[1] The reduction was made on the government's motion under Fed. R. Crim. P. 35(b), in light of petitioner's substantial assistance in the investigation or prosecution of another case.

less can be served in a halfway house or home detention rather than prison, *id.* § 7B1.3(c)(1).

Having found that petitioner committed multiple violations of the conditions of his supervised release, the district court revoked petitioner's supervised release and sentenced him to six months of home detention to be followed by 24 months of supervised release. Pet. App. 3a, 22a, 24a, 27a. During the period of home detention, petitioner was specifically permitted to leave home for his employment and for other activities pre-approved by his probation officer, including activities with his children. *Id.* at 15a, 31a. In its written statement of reasons for imposing the revocation sentence, the district court explained in part:

> The reasons for the sentence imposed are as follows: to reflect the seriousness of the offense; to promote respect for the law; to provide just punishment; to provide an adequate deterrence to [petitioner] and others from criminal conduct; and to protect the public from future crimes of [petitioner] and of others who may participate in similar offenses.

Id. at 11a.

4. The court of appeals affirmed the revocation sentence. Pet. App. 1a-16a. It first rejected petitioner's argument that the district court had abused its discretion in determining that petitioner violated the terms of his supervised release. *Id.* at 3a-8a. (Petitioner does not reassert that argument in this Court. Pet. 6 n.3.) The court of appeals then considered and rejected petitioner's argument that the district court had committed a procedural error when imposing a revocation sentence by considering a Section 3553(a) factor that is not included in the list in Section 3583(e). Pet. App. 8a-15a.

The court of appeals held "that it does not constitute reversible error to consider § 3553(a)(2)(A) when imposing a sentence for violation of supervised release, even though this factor is not enumerated in § 3583(e)." Pet. App. 13a. Focusing on the statutory language, the court explained that Section 3583(e) "provides merely that the [district] court 'may, after considering the [specified] factors . . . revoke a term of supervised release.' It does not state that a court may revoke supervised release after '*only* considering' the enumerated factors." *Id.* at 13a-14a. The court recognized conflicting views among the courts of appeals, but concluded that its approach, shared by the Second Circuit, was the sounder statutory interpretation. *Id.* at 13a.

The court of appeals also observed that "the three considerations in § 3553(a)(2)(A) * * * are essentially redundant with matters courts are already permitted to take into consideration when imposing sentences for violation of supervised release." Pet. App. 14a. It noted that the district court is specifically authorized to consider the Section 3553(a)(1) factor of the "nature and circumstances of the offense." *Ibid.* Quoting this Court's observation that a "violation of the terms of supervised release tends to confirm the judgment that help was necessary" to aid the prisoner's adjustment into the community, *Johnson* v. *United States*, 529 U.S. 694, 709 (2000), the court of appeals concluded that such "help" includes assisting the supervisee to "learn to obey the conditions of his supervised release—in other words, that he learn to respect the law." Pet. App. 14a. The court of appeals also noted that the Sentencing Commission's introduction to its policy statements on the revocation of supervised release explain that "the sentence imposed upon revocation . . . [is] intended to sanction

the violator for failing to abide by the conditions of the court-ordered supervision." *Id.* at 15a (citation omitted); see also Sentencing Guidelines Ch. 7, Pt. A(3)(b). From that statement, the court inferred that, "although violations of supervised release generally do not entail conduct as serious as crimes punishable under the § 3553(a) regime, revocation sentences are similarly intended to 'sanction,' or, analogously, to 'provide just punishment for the offense' of violating supervised release." Pet. App. 15a. In sum, the court of appeals reasoned that, "[g]iven that the three considerations in § 3553(a)(2)(A) are consistent with considerations already permissible for revocation sentences, the fact that § 3583(e) does not require that courts consider § 3553(a)(2)(A) does not mean that courts are forbidden to consider that factor, and the fact that a sentencing court does consider § 3553(a)(2)(A) is not error." *Ibid.*

The court of appeals concluded that "[t]he sentence in this case was thus neither unreasonable nor plainly unreasonable." Pet. App. 15a.[2] The court observed that the duration of the revocation sentence was toward the bottom of range in the Guidelines policy statement and that the district court permitted petitioner to serve his term of confinement by home detention. *Ibid.*

ARGUMENT

Petitioner argues (Pet. 8-18) that there is a conflict among the courts of appeals about whether a district court, upon revocation of supervised release, may consider the factors identified in Section 3553(a)(2)(A) in

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[2] Because it found that petitioner's sentence was neither unreasonable nor plainly unreasonable, the court of appeals declined to decide the standard for reviewing a revocation sentence in light of *United States* v. *Booker*, 543 U.S. 220 (2005). See Pet. App. 8a-10a.

addition to the other criteria that are expressly enumerated in Section 3583(e). Despite the existence of a still-evolving circuit conflict, review by this Court is not warranted. The court of appeals correctly construed the statute not to prohibit district courts from considering unlisted factors in determining whether to revoke supervised release and reincarcerate a defendant. Moreover, there is no indication that the circuit split will have any significant effect on revocation decisions, and no reason to believe that petitioner, in particular, would have been treated more leniently if the district court had not considered the Section 3553(a)(2)(A) factors. Even if this Court were to grant the petition for a writ of certiorari, the case would very likely become moot upon the expiration of petitioner's revocation sentence, absent imposition of a highly expedited schedule for briefing and argument, followed by an unusually rapid issuance of a decision before November 2008.

1. The court of appeals correctly determined that Section 3583(e) should not be construed as limiting the factors that a district court may consider when determining whether to revoke supervised release and reincarcerate a defendant.

a. Section 3583(e) is permissive in nature. By its plain terms, it provides that the district court

> *may*, after considering [certain] factors set forth in [Section 3553(a)]—
>
> (1) terminate a term of supervised release * * * ;
>
> (2) extend a term of supervised release * * *, and may modify, reduce, or enlarge the conditions of supervised release * * * ;
>
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or

> part of the term of supervised release * * * if the court * * * finds by a preponderance of the evidence that the defendant violated a condition of supervised release * * * ; or
>
> (4) order the defendant to remain at his place of residence during nonworking hours.

18 U.S.C. 3583(e) (2000 & Supp. V 2005) (emphasis added). The list of enumerated factors includes eight of the ten factors in Section 3553(a) but does not mention Section 3553(a)(2)(A) or (a)(3). As petitioner concedes (Pet. 23), however, "Congress did not expressly state that the listed considerations are the 'only' factors that can be considered or that the excluded factors cannot be considered."

In the context of Section 3583(e)—which addresses an aspect of criminal sentencing and which enumerates criteria for the district court to consider in deciding whether to increase *or* decrease either the length or the conditions of a term of supervised release—it is reasonable to conclude that Congress did not intend to cabin district courts' discretion by implicitly putting some factors entirely beyond their reach. Although petitioner invokes (Pet. 19-20, 23) certain traditional canons of statutory construction to argue otherwise, those canons are not implicated in this context. The court of appeals' reading—which *requires* a district court to consider the factors that are enumerated in Section 3583(e) but *does not require* consideration of other factors—is perfectly consistent with the idea that Congress "act[ed] intentionally and purposely" in deciding to incorporate only parts of Section 3553(a) in Section 3583(e). *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted). Similarly, expressly requiring the court to consider some factors can certainly imply that other factors are

not required to be considered, as the *expressio unius* canon would counsel (Pet. 23), without necessarily *prohibiting* the consideration of such other factors.

The court of appeals' reading is consistent with petitioner's claim that the list of factors was intended to "focus attention on the specific purposes of the sentencing process." Pet. 20 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 119 (1983)). Requiring the consideration of some factors focuses attention even if there is no simultaneous prohibition on the consideration of other factors. And the court of appeals' reading is consistent with the general policy, expressed in the statute itself, that judges have broad discretion to consider matters they find relevant to sentencing. See 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

b. As the court of appeals explained (Pet. App. 14a-15a), petitioner's reading of the statute draws an artificial and untenable line between Section 3553(a)(2)(A) and the factors that are enumerated in Section 3583(e). Petitioner acknowledges that a district court issuing a sentence upon revocation of supervised release may consider, among other factors, "the nature and circumstances of the offense," "the history and characteristics of the defendant," the need to "afford adequate deterrence," the need to "protect the public from further crimes of the defendant," and the "policy statements" of the Sentencing Commission about the revocation of supervised release. 18 U.S.C. 3553(a)(1), (a)(2)(B), (a)(2)(C); 18 U.S.C. 3553(a)(4)(B) (Supp. V 2005). In this context, those policy statements expressly acknowledge

the need to "sanction * * * the defendant's breach of trust [in violating the terms of supervised release]," and the need to "tak[e] into account, to a limited degree, the seriousness of the underlying violation." Sentencing Guidelines Ch. 7, Pt. A(3)(b).

Effective consideration of those factors will often intrinsically justify consideration of the need "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment." 18 U.S.C. 3553(a)(2)(A). As the Second Circuit has explained, it is hard to "see how" a district court "could possibly ignore the seriousness of the offense" while evaluating many of the other permissible factors, including "'adequate deterrence,'" protecting "the public from 'further crimes of the defendant,'" and "'the nature and circumstances of the offense.'" *United States* v. *Williams*, 443 F.3d 35, 48 (2006) (quoting 18 U.S.C. 3553(a)(1), (a)(2)(B), and (a)(2)(C)). Similar analysis applies to the other prongs of Section 3553(a)(2)(A). Aspects of the need "to promote respect for the law, and to provide just punishment" pursuant to Section 3553(a)(2)(A) are often intertwined with and thus encompassed by the consideration of "the nature and circumstances of the offense," "the history and characteristics of the defendant," and the need to "sanction * * * the defendant's breach of trust." 18 U.S.C. 3553(a)(1); 18 U.S.C. 3553(a)(4)(B) (Supp. V 2005); Sentencing Guidelines Ch. 7, Pt. A(3)(b).

2. As the facts of this case illustrate, the difference between the court of appeals' permissive approach and petitioner's prohibitive approach is not likely to make a practical difference in most revocation sentences—aside from dictating the labels that district courts must use when exercising their sentencing discretion. Under petitioner's view, district courts would simply need to avoid

attributing to the wrong subparts of Section 3553(a) their *permissible* consideration of "the nature and circumstances of the offense," the "the history and characteristics of the defendant," and the need to "sanction" the defendant.

There is little likelihood that petitioner's own revocation sentence was adversely affected by the district court's consideration of the Section 3553(a)(2)(A) factors. The district court was concerned about petitioner's record of defying the very concept that the probation officer was entitled to supervise him while he was on supervised release. Thus, the district court was entitled to sanction petitioner for his refusal to, among other things, tell the probation officer "where he admittedly spends the majority of his time." Pet. App. 20a. In doing so, the court tried to convince petitioner to abandon his "argumentative, defiant stance" and realize that "[e]verybody[] that's under supervision has to undergo the same kind of scrutiny." *Id.* at 32a. Such concerns do not reflect a primary focus on "just punishment" as opposed to rehabilitation and the need to sanction petitioner for his prior breach of trust.

The sentence that resulted bears out the reasonableness of the district court's approach. Petitioner received a revocation sentence of six months of home detention, followed by 24 months of supervised release. The sentencing range recommended by the Guidelines policy statement—which the district court was indisputably *required* to take into account—went from 5 months of home detention to 11 months of incarceration in prison. Sentencing Guidelines §§ 7B1.3(c)(1), 7B1.4(a). Despite petitioner's concern that the district court was unduly punitive, the district court selected the most lenient form of incarceration (home detention) and a time period

very near the low end of the range. Petitioner articulates no reason why his sentence, in light of the range recommended by the policy statement, should have been even lower than it was.

3. Petitioner overstates the extent of the conflict within the courts of appeals by claiming that the "two-to-two split acknowledged by the Sixth Circuit" is "considered and entrenched." Pet. 14. Although the court of appeals assumed that it was siding with the Second Circuit against the Fourth and Ninth Circuits (Pet. App. 13a), neither the Fourth nor the Ninth Circuit is as restrictive as petitioner implies.[3]

Petitioner himself acknowledges that the Ninth Circuit has "clarified" that at least one of the just-punishment factors may in fact be considered "in the course of evaluating the criminal history of the defendant"—as long as that factor is not the "'sole[]'" or "'primar[y]'" basis for the revocation sentence. Pet. 9 n.5 (quoting *United States* v. *Simtob*, 485 F.3d 1058, 1062-1063 (9th Cir. 2007) (emphasis omitted)). Petitioner provides no explanation why that result is consistent with his assumption (Pet. 24-25) that there can be no redundancy among the various subparts of the Section 3553(a) factors.

Yet, even assuming that there is a meaningful difference in practice between the Ninth Circuit and the decision below, the Fourth Circuit has not clearly taken the Ninth Circuit's side. Although *United States* v. *Crudup*, 461 F.3d 433 (4th Cir. 2006), cert. denied, 127 S. Ct. 1813 (2007), stated that a district court considering a revocation sentence is "not authorized to consider" the factors

[3] As petitioner recognizes (Pet. 11-13), other circuits appear to have applied a permissive interpretation of Section 3583(e) in cases where the question was not squarely presented.

in Section 3553(a)(2)(A), 461 F.3d at 439, that statement was dicta insofar as the district court in that case had not invoked Section 3553(a)(2)(A) in justifying its sentence and the defendant had not argued that any impermissible factors were considered. See *id.* at 435, 440. Subsequent cases from the Fourth Circuit are more consistent with the permissive view of the Second and Sixth Circuits. Thus, in *United States* v. *Moulden*, 478 F.3d 652 (2007), the Fourth Circuit characterized Section 3583(e) as standing for the proposition that a district court "*must* * * * consider the applicable § 3553(a) factors," but said nothing about what it is *prohibited* from considering. *Id.* at 656 (emphasis added).[4] In fact, *Moulden* elsewhere noted that a revocation sentence "should aim *to 'sanction* the violator for failing to abide by the conditions of the court-ordered supervision,' and *to punish* the inherent 'breach of trust' indicated by the defendant's behavior." *Id.* at 655 (emphases added) (quoting Sentencing Guidelines Ch. 7, Pt. A(3)(b)). Although it comes from the Fourth Circuit, such open recognition of the district court's ability to "sanction" and "punish" is not consistent with petitioner's principal ar-

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[4] Petitioner describes *Moulden* as "noting that a court revoking supervised release may consider 'just some of' the factors listed in 18 U.S.C. § 3553(a)." Pet. 10. The line petitioner quotes comes from a paraphrase of the defendant's unsuccessful argument in that case, rather than the court's own description of the law. Nevertheless, even that quotation speaks only to what the district court "must" consider, as opposed to anything that it may be *prohibited* from considering. See 478 F.3d at 656 ("Moulden urges that, because a court imposing a sentence upon revoking a defendant's probation must consider all § 3553(a) factors—rather than just some of those factors, as is the case when revoking supervised release—a probation revocation sentence is indistinguishable from the usual guidelines sentence for purposes of our review.") (citations omitted).

gument (Pet. 20-24) that revocation cannot serve "punitive" purposes.

Furthermore, since the petition was filed, the Third Circuit has indicated (albeit in an unpublished opinion) its agreement with the Second and Sixth Circuits. See *United States* v. *Kay*, No. 07-4708, 2008 WL 2569341 (June 30, 2008). In *Kay*, the court held that the district court did not commit clear error if it "considered the seriousness of [the defendant's] crimes in" refusing to terminate supervised release under Section 3583(e), because, "as the United States Courts of Appeals for the Second and Sixth Circuits have already held, the consideration of whether the sentence reflects the seriousness of an offender's crime is not limited to § 3553(a)(2)(A), but is expressed redundantly in the *other factors courts are required to consider* under § 3583(e)." *Id.* at *3 (emphasis added).

Given these developments in the evolving case law, and the seemingly convergent results, petitioner's claim that the conflict in the circuits is fully "considered," "de[e]p[]," "entrenched," and unlikely to develop further in light of future cases is considerably overstated. Pet. 14-15.

4. Finally, even if this Court were to issue a writ of certiorari to review this case, it would very likely become moot if the Court did not significantly expedite briefing and argument on the merits and issue its decision quickly, because the sentence that petitioner challenges is scheduled to expire by November 1, 2008.

"It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology* v. *United States*,

506 U.S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)). Thus, "[t]o qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks and citation omitted). "[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party," *Church of Scientology*, 506 U.S. at 12 (citation omitted), or that deprives that party of a "legally cognizable interest in the outcome," *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000) (citation omitted), the appeal must be dismissed for want of Article III jurisdiction.

The completion of a criminal defendant's sentence normally does not moot an appeal challenging his conviction. See *Sibron* v. *New York*, 392 U.S. 40, 57-58 (1968). But the analysis is different when a defendant challenges only his sentence. See *Spencer* v. *Kemna*, 523 U.S. 1, 7-8 (1998). In *Spencer*, this Court held that the petitioner's challenge to an order revoking his parole became moot when "[t]he reincarceration that he incurred as a result of that action" was completed and could not "be undone." *Id.* at 8. The Court explained that, unlike a conviction, the mere revocation of parole does not have sufficiently concrete "collateral consequences" to constitute injury-in-fact for purposes of Article III jurisdiction. *Id.* at 12-18; see also *Lane* v. *Williams*, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot.").

For the same reasons, a defendant's challenge to a sentence imposed upon revocation of supervised release

will become moot when that sentence is completed. See, *e.g.*, *United States* v. *Mazzillo*, 373 F.3d 181, 182 (1st Cir. 2004) ("An appeal from an order revoking supervised release is ordinarily moot if the sentence is completed before the appeal is decided."); *United States* v. *Meyers*, 200 F.3d 715, 722 (10th Cir. 2000) ("[W]hen a defendant appeals the revocation of his supervised release and resulting imprisonment and has completed that term of imprisonment, the potential impact of the revocation order and sentence on possible later sentencing proceedings does not constitute a sufficient collateral consequence to defeat mootness.").

In this case, petitioner does not challenge the revocation of his supervised release, but only the sentence that was imposed upon revocation. See Pet. 6 n.3. He has not argued that his revocation sentence imposes any concrete injury that will continue, and still be redressable, after his sentence ends. Accordingly, when that sentence is complete, it is likely that he will no longer have any legally cognizable interest in having that sentence invalidated, and his appeal will become moot.[5]

Petitioner's six-month term of home detention began on May 1, 2006. See Pet. App. 21a (listing May 1, 2006 as "Date of Imposition of Judgment"); *id.* at 22a (ordering that home detention "be served immediately"); see also Dist. Ct. Amended Notice of Appeal (appealing "the

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[5] Indeed, because petitioner does not challenge the basis for the decision to revoke his supervised release, his case would become moot upon completion of his sentence even under the reasoning of Justice Stevens's dissenting opinion in *Spencer*. See 523 U.S. at 22-23 (distinguishing a case in which the defendant "challenges the factual findings on which his parole revocation was based" from *Lane*, in which the defendants "simply sought to challenge their sentences; yet because they had been released by the time the case reached us, the case was moot").

sentence imposed by the District Court on May 1, 2006, revoking his supervised release entered on the docket on May 4, 2006"). Thus, petitioner's 24 months of supervised release—and the entirety of his sentence upon revocation—are scheduled to expire by November 1, 2008. As a result, even if the Court is inclined to grant certiorari on the question presented, in order to complete this case before it could be expected to become moot, the Court would need to expedite merits briefing and oral argument, and issue a decision on the merits with unusual dispatch.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

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IN THE

Supreme Court of the United States

TERRANCE L. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

Ronald C. Small
Michael C. Holley
OFFICE OF THE FEDERAL PUBLIC DEFENDER
810 Broadway Street
Suite 200
Nashville, TN 37203

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

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REPLY BRIEF FOR THE PETITIONER

The government does not dispute that the petition for certiorari presents a question upon which the courts of appeals are divided, as acknowledged by the Sixth Circuit's decision in this case. Nor does the government contest that the question of what factors a judge may consider in sentencing a defendant for violation of the terms of supervised release is one of recurring significance in thousands of revocation hearings every year. *See* Pet. 15-17. The Solicitor General nonetheless opposes review, suggesting that the division in the circuits is unworthy of this Court's attention and that this case presents a poor vehicle for resolving the conflict.

Neither argument has any merit. The circuit split is real and enduring. Moreover, the government's assertion that the question presented lacks practical importance is based on an erroneous assumption that the "just punishment" factors Congress separately codified in 18 U.S.C. § 3553(a)(2)(A), and expressly excluded from Section 3583(e), are surplusage, meaninglessly repeating other factors codified elsewhere. At the same time, there is no basis for the government's speculation that the district court's consideration of improper factors had no effect on petitioner's sentence. The government has never argued that any error in this case would be harmless and there is no basis for such a claim in any case.

Finally, there is no prospect that the case will become moot during its pendency in this Court. As it has done in similar circumstances in the past, the Court can and should simply stay petitioner's sentence in granting review.

I. The Government's Attempts To Diminish The Extent And Importance Of The Circuit Split Are Unconvincing.

While not denying the existence of a circuit split, the government nonetheless attempts to minimize the extent of the conflict and to suggest that the case law may be "evolving" toward uniformity. BIO 15. That suggestion does not withstand scrutiny.

1. The government points out that the Ninth Circuit has held that "one of the just-punishment factors" – the seriousness of the offense – "may in fact be considered 'in the course of evaluating the criminal history of the defendant'" so long as it is not the sole or primary basis for the revocation sentence. BIO 13 (quoting *United States v. Simtob*, 485 F.3d 1058, 1062-63 (9th Cir. 2007) (emphasis omitted)). But the government does not deny that the Second and Sixth Circuits, by contrast, place no restriction at all on the consideration of that factor, or that the Ninth Circuit absolutely precludes consideration of the other factors excluded from section 3583(e). Accordingly, the government does not dispute that petitioner's sentence – which was based on *all* of the omitted factors, *see* Pet. App. 11a – would be reversed in the Ninth Circuit.

The Ninth Circuit has thus consistently vacated sentences that would have been affirmed in the Second or Sixth Circuits. *See, e.g.*, *United States v. Simtob*, 485 F.3d 1058, 1063-64 (9th Cir. 2007); *United States v. Barnes*, No. 07-50198, 2007 WL 4227258 (9th Cir. Dec. 3, 2007); *United States v. Ramirez*, 222 Fed. App'x 642, 643 (9th Cir. 2007). As those decisions illustrate, the Ninth Circuit continues to apply its precedent despite conflicting decisions

from other circuits. The government accordingly does not suggest that the Ninth Circuit is likely to reconsider its position without this Court's intervention.

2. The government further recognizes that in *United States v. Crudup*, 461 F.3d 433, 439 (2006), the Fourth Circuit concluded that "in devising a revocation sentence the district court is not authorized to consider" factors omitted from Section 3553(a)(2)(A). *See* BIO 14-15. However, the government argues that this statement does not represent the law of the Fourth Circuit because the issue was not squarely before the court in *Crudup* and because, it says, a subsequent case indicates that the Fourth Circuit has moved to a position "more consistent with the permissive view of the Second and Sixth Circuits." *Id.* 14. Both claims are wrong.

First, in subsequent cases, both published and unpublished, the Fourth Circuit has treated *Crudup* as settling the question and precluding district courts from considering the excluded Section 3553(a) factors. *See, e.g.*, *United States v. Turner*, 241 Fed. App'x 168, 170 (4th Cir. 2007); *United States v. Moulden*, 478 F.3d 652, 656 (4th Cir. 2007).

Second, nothing in *Moulden* – which relied extensively on *Crudup*, *see* 478 F.3d at 656-57 – remotely suggests that the Fourth Circuit has backed away from its prior understanding. *Contra* BIO 14-15. The government does not assert that *Moulden* expressly repudiated *Crudup*'s reading of the statute and whatever indirect hints of a retrenchment the government sees in the opinion have been missed by the Fourth Circuit itself. In a subsequent case that court has directly quoted *Crudup* for the proposition

that "the district court is not authorized to consider whether the revocation sentence 'reflect[s] the seriousness of the offense, . . . promote[s] respect for the law, and . . . provide[s] just punishment for the offense.'" *Turner*, 241 Fed. App'x at 170 (quoting *Crudup*, 461 F.3d at 439).

3. Finally, the government does not contest that the Eleventh Circuit has repeatedly instructed the lower courts in that circuit that consideration of factors omitted from Section 3583(e) is not only permissible, but *required*. *See* Pet. 12-13. That view is inconsistent with the decisions of all of the other circuits to have considered the question.

II. The Question Presented Is Recurring And Important.

The government offers no response to the petition's demonstration that the appropriate factors for consideration in setting a revocation sentence is a frequently recurring question, arising in thousands of cases every year. *See* Pet. 15-17. Instead, the Solicitor General argues that the circuit split is unimportant because it makes little practical difference to actual sentencing practices. BIO 11-12. The government reasons that even if Congress prohibited trial courts from considering the "just punishment" factors directly, that prohibition has limited practical importance because courts can take into account the same considerations under other permissible headings. *Id.* 12.

In fact, Congress plainly did not share the government's belief that the omitted factors meaninglessly repeat what Congress had already required courts to consider elsewhere. Congress not only took care to enumerate the "just punishment"

factors as separate factors in Section 3553(a)(2)(A), but also to exclude them from the list of factors incorporated by reference in Section 3583(e). Although the government says that Congress excluded these factors simply to avoid *requiring* the sentencing court to consider them – an erroneous view discussed below – it offers no explanation for why Congress would have made even *that* choice if it thought, as the government believes, that the omitted factors were already essentially covered by other factors it was requiring the court to consider. That is, why would Congress take pains to avoid requiring the sentencing court to consider the "just punishment" factors yet nonetheless require the court to consider other factors that, the government says, cover essentially the same ground?

To the extent there is arguable overlap between permissible and excluded factors, the answer is not to declare Congress's directives meaningless, but rather to seek an accommodation that gives meaning and significance to all aspects of the statute. *See, e.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The Ninth Circuit has attempted such an accommodation by holding that a court may consider the seriousness of the present offense to the extent it sheds light on other appropriate factors (such as the "history and characteristics of the defendant") but may not seek to use the revocation sentence primarily as a means of punishing the revocation conduct (which Congress intended to be subject to independent punishment under the criminal code). *Simtob*, 485 F.3d at 1062-63. The government offers no explanation for why such a rule would not provide truly meaningful guidance to sentencing judges. It would direct them to focus their attention on the rehabilitative purposes

of supervised release rather than some perceived need to punish violations of its conditions as if they were violations of the criminal law. Nor does the government provide any evidence to support its assertion that courts given such guidance would not change their actual sentencing practices.

III. This Case Presents An Appropriate Vehicle For Resolving The Circuit Split.

On the same theme, the government argues that this case presents a poor vehicle for deciding the question presented because there is "little likelihood that petitioner's own revocation sentence was adversely affected" by the district court's consideration of omitted factors. BIO 12. The Solicitor General goes even further to assert that even if the Court thought otherwise, it could not use this case to decide the question presented because the case will become moot before the Court could issue a decision. *Id.* at 15-18. Neither argument has any merit.

1. The government did not argue below, and does not argue here, that any error in petitioner's sentencing was harmless. That omission is telling. While the government makes much of the fact that petitioner's sentence fell "very near the low end of the range," BIO 13, it neglects to mention that the government itself, after explaining that the Guidelines recommended a sentence from five to eleven months, proposed "the minimum term of five months" and stated that "we would have no objection to" the time being served in a halfway house. Pet. App. 29a-30a. The government explained that petitioner "has had a good job," and, it admitted,

"these are not the worst offenses we've ever seen in a supervised release context." *Id.* 30a.

The district court likewise recognized that petitioner was "on the right track," Pet. App. 33a, having made exemplary progress toward reintegrating into society, with the exception of his present, relatively minor, violations of the terms of his supervised release. The court did not find, as is so often true in other cases, that petitioner had returned a life of crime. To the contrary, the court told petitioner "You've got a good job. Apparently, you are a good worker. That's to your credit. . . . You apparently are doing well in it." *Id.* 31a. The court also noted approvingly that petitioner was making substantial efforts to be involved in the lives of his children. *Id.* 33a.

Nonetheless the government had argued strongly that "the Court should impose some form of punishment to get [petitioner's] attention." Pet. App. 30a. As described in the petition, Pet. 17-18, there is every reason to believe that the district court's decision to subject petitioner to confinement, and to an extended two-year additional period of supervised release with onerous conditions, was due in large part to its acceptance of that request.

At the very least, in the absence of a claim of harmless error, any uncertainty as to how the district court would have ruled if it had complied with the sentencing statute should not prevent this Court from resolving an important circuit conflict over the meaning of Section 3583(e).

2. The Solicitor General's mootness argument also provides no basis for denying review. The straightforward answer is that this Court can and

should avoid that prospect by staying petitioner's sentence pending the Court's resolution of the case. During the period of the stay, petitioner would not be subject to supervised release. If this Court affirmed the judgment on the merits, the stay would expire and petitioner would be subject to the remaining term of supervised release. *See, e.g., Noyd v. Bond*, 395 U.S. 683, 688-93 (1969) (Court stayed military officer's court martial sentence in order to avoid prospect that completion of sentence would moot petition for certiorari); *see also, e.g., Wise v. Lipscomb*, 434 U.S. 1329, 1334 (1977) (Powell, J., in chambers) (granting stay of civil judgment in part because if "the remedy ordered by the Court of Appeals were effectuated, the issues presented here probably would be mooted"); *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) (noting that "[p]erhaps the most compelling" reason for granting a stay "would be to protect this Court's power to entertain a petition for certiorari"); *cf. Calley v. Callaway*, 496 F.2d 701, 702 n.1 (5th Cir. 1974) (noting that such stays are appropriate in habeas context for "short sentences for relatively minor crimes so near completion that extraordinary action is essential to make collateral review truly effective"); *Boyer v. City of Orlando*, 402 F.2d 966, 968 (5th Cir. 1968) (same).[1]

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[1] The traditional criteria for a stay are easily met. "When, as in this case, 'the normal course of appellate review might otherwise cause the case to become moot,' issuance of a stay is warranted" because the "balance of harms favors" the petitioner and because "foreclosure of certiorari review by this Court would impose irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) (citation omitted). *See also John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309

IV. The Court Of Appeals' Decision Is Wrong.

The government also argues that certiorari in unwarranted because, in its view, the decision below was correct. BIO 8. That assertion is wrong and, in any event, provides no basis for delaying resolution of the circuit split.

Like the Sixth Circuit, the government argues that Congress's express exclusion of the just punishment factors from the list of required considerations in Section 3583(e) simply shows that the provision "*requires* a district court to consider the factors enumerated in Section 3583(e) but *does not require* consideration of other factors" including just punishment factors specifically excluded. BIO 9 (emphases in original). But the government offers no explanation for *why* Congress would have intended to require courts to consider all of the other ordinary sentencing factors, yet provide no direction with respect to the "just punishment" factors. If, as the government contends, Congress believed that it was entirely appropriate for a revocation sentence to punish a violation of the terms of supervision as if it were a violation of the criminal law, Congress presumably would have *required* district courts to consider the need for the sentence to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

(1989) (Marshall, J., in chambers) (prospect of mootness creates irreparable injury). Moreover, as described in the petition and this reply, the case presents a question worthy of review and upon which petitioner is likely to prevail. Nor is there any inequity in granting a stay, which would not prejudice the government, particularly given that it sought and received three extensions of time to respond to the petition for certiorari.

18 U.S.C. § 3553(a)(2)(A). It is implausible for the Solicitor General to suggest that Congress was agnostic as to the central purpose of revocation sentencing.

Petitioner, on the other hand, has offered a perfectly sensible explanation for why Congress excluded the "just punishment" factors from consideration in the revocation context: Congress intended the violation of terms of supervision to be treated not as equivalent to a new criminal act, but rather as a breach of trust indicating a need not for criminal punishment but for corrective action to aid in the rehabilitative process supervised release was designed to serve. Pet. 20-23. To be sure, the distinction between a rehabilitative "sanction" and "just punishment" of a criminal offense may be subtle and there are undoubtedly areas of overlap, as reflected by the fact that Congress required revocation courts to consider most (but not all) of the factors considered in sentencing criminal conduct. *See* BIO 10-11. But it is a distinction Congress plainly intended, and one that it believed was meaningful. *See* Pet. 22-23. It is not for the United States, or the court of appeals, to decide that the line Congress drew is "untenable," BIO 10, or unworthy of respect.

The government responds that petitioner's reading disregards the broad discretion generally enjoyed by sentencing courts. BIO 10.[2] But the

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[2] The government's citation to 18 U.S.C. § 3661, *see* BIO 10, is inapt. By its terms, that provision applies only to the sentencing of "a person convicted of *an offense*" (emphasis added). Congress separately codified the sentencing factors for violations of supervised released precisely because it intended to

entire point of Section 3583(e) is to guide and limit that discretion. Precluding a court from considering the need for just punishment does not intrude upon sentencing discretion appreciably more than requiring the court to consider a variety of factors it might otherwise believe unimportant or irrelevant.

Finally, even if the government were right on the merits, granting review in this case to bring uniformity to the revocation process would still be appropriate.

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make a distinction between violations of the terms of supervised release and criminal offenses. Pet. 20-22.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted and petitioner's sentence stayed pending disposition of the case on the merits.

Respectfully submitted,

Ronald C. Small
Michael C. Holley
OFFICE OF THE FEDERAL PUBLIC DEFENDER
810 Broadway Street
Suite 200
Nashville, TN 37203

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814
(301) 941-1913

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